Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT W. AYLWARD,

Petitioner,

versus

CLAIRE W. BAMBERG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE CLOSURE ORDER OF THE U.S. DISTRICT COURT TO SEAL BAMBERG'S DOCUMENTS ATTACHED TO HER AFFIDAVIT FROM AYLWARD'S PERSONAL ACCESS AND TO ENJOIN HIS LAWYER FROM DISCUSSING THE DOCUMENTS WITH HIS CLIENT DENIED AYLWARD THE RIGHT AND FAIR OPPORTUNITY TO PREPARE AND REBUT BAMBERG'S MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO THE DUE PROCESS REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 56?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of Robert W. Aylward v. Claire W. Bamberg, United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, No. 98-2119, is set forth in the Appendix, at 1a. The Order on Defendant's Motion for Partial Summary Judgment in *Robert W. Aylward* v. *Claire W. Bamberg,* United States District Court for the Southern District of Indiana, Indianapolis Division, No. 94-C-705 dated November 18, 1997 is set forth in the Appendix, at 14a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254 and 28 U.S.C. 2101(c). The United States Court of Appeals for the Seventh Circuit issued its order on July 6, 1999. There is no order respecting rehearing or granting an extension of time to file the petition for a writ of certiorari. This petition was timely filed within 90 days of the order of the circuit court.

RELEVANT FEDERAL RULES INVOLVED IN THIS CASE

Fed. R. Civ. P. 56 (a):

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R. Civ. P. 56 (b):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

STATEMENT OF THE CASE

Appellant Robert W. Aylward ("Aylward") raised a defamation claim against Appellee Claire W. Bamberg ("Bamberg") in the U.S. District Court, Southern Indiana based on diversity jurisdiction. Essentially, Aylward, a military officer residing in the State of Georgia, alleged that Bamberg, a resident of the State of Indiana and counselor to Aylward's former wife, in conspiracy with her and

others, committed slander against him under Indiana law when she reported to the military police at Fort Benning, Georgia that he sexually abused his children. Bamberg responded that Indiana law required her to make the report and shielded her with immunity.

Bamberg filed a motion for partial summary judgment on Aylward's defamation claim. In support of the motion, Bamberg submitted a set of numerous documents attached to her affidavit consisting of ninety-nine pages concerning Aylward's children to show that she had reasonable belief of the alleged sexual abuse. Bamberg also filed a motion to seal the documents, not only from public access, but also from Aylward's personal access or review. Bamberg contended that because of her relationship with Aylward's former wife, the privilege of communication between psychotherapist and patient required sealing the documents.

Aylward objected to the admissibility of the documents for several reasons, including, hearsay grounds and Bamberg's lack of personal knowledge of the information contained in the documents. Subject to whatever evidentiary value the documents may have, Aylward did not object to the district court's closure order to seal the documents from public access, but did object to the court sealing them from his personal access or review and the restriction imposed upon his lawyer from discussing the information contained in the documents with him. Aylward contended that because Bamberg was not licensed or certified by any state, no psychotherapist-patient privilege stood as legal and sufficient grounds for the closure order.

Without explanation or entering findings of fact for doing so, the district court granted the motion to seal the documents. The order permitted Aylward's lawyer to have access to the documents, but Aylward was prohibited from viewing them and Aylward's lawyer was enjoined from discussing them with anyone, including Aylward. The dis-

trict court issued an order of partial summary judgment in favor of Bamberg. Aylward took an interlocutory appeal pursuant to Fed.R.Civ.P. 54 (b). The Court of Appeals of the Seventh Circuit agreed that Bamberg failed to show that there was a privilege that justified sealing the documents, but affirmed the district court's order on the basis that sealing the documents protects the interest of Aylward's children.

ARGUMENT

The Closure Order of the Court Denied Aylward the Right and Fair Opportunity to Prepare and Rebut Bamberg's Motion for Summary Judgment Pursuant to the Due Process Requirements of Rule 56.

The closure order denied Aylward the right and the fair opportunity to prepare and rebut the motion for summary judgment. The Supreme Court has stated that when a court finds that the presumption of access has been rebutted by some countervailing interest, that "interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 510, 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1985). The reason for this holding is because public access is essential to the proper functioning of the court. There is a public interest in assuring that courts are fairly run and judges are honest. *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1314 (C.A.7, Ill. 1984) The district court did not explain or enter findings of fact in regard to the closure order. However, the court of appeals determined that sealing the documents protects the interest of Aylward's children. Because the issue before this court is not whether the public should have access to the documents, no countervailing interest of the Aylward's

children raises a First Amendment issue of public disclosure as discussed in *Press Enterprise Co.* Nevertheless, the principle of judicial fairness to adversarial litigants require that they have full access to the same information used as evidence.

Sealing is an exceptional measure. See *Grove Fresh Distributors, Inc.* v. *Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir.1994) (seal only appropriate where necessary to preserve higher values). The district court should only seal documents which are necessary and legally required to keep confidential. See *Matter of Krynicki*, 983 F.2d 74 (7th Cir. 1992) Sealing the documents was not necessary because Aylward's children were not directly involved in this case and had no interest in the outcome. Furthermore, there was no legal requirement that the documents had to be concealed. Thus, Bamberg failed to show that this closure measure was so compelling as to constitute an extraordinary exception to deny Aylward's full personal participation in this case.

In contrast, Aylward has a significant evidentiary burden to overcome the motion for summary judgment which may preclude the opportunity to litigate his case before a jury. Rule 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in

> this rule, must set forth specific facts showing that there is a genuine issue for trial.

The focus of the evidentiary burden on both litigants is on the matter of "genuine issue of material fact." See *Anderson* v. *Liberty Lobby, Inc.*, 455 U.S. 242 (1986). As to materiality, the substantive law will identify which facts are material. Id. Summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* Consequently, probative evidence on a motion for summary judgment must be the same kind of evidence upon which the parties may conduct direct and cross examination in open court.

On a motion for summary judgment the nonmovant's lawyer must look to his client for facts or where he might find the facts to meet his client's evidentiary burden to show that there is a genuine issue of material fact. The district court's order to seal Bamberg's documents from Aylward's personal access or review is analogous to strapping his lawyer with one of his arms behind his back to prevent him from acquiring the assistance of his client to conduct a cross examination of the documents and in seeking specific rebuttal facts to those submitted by Bamberg to support her motion. As the court of appeals indicated, Bamberg's concern for protecting herself is misplaced since she put the documents in issue as evidence. Due process and fair play requires that Aylward is able to see the evidence Bamberg sees and uses against him, and vice versa. Our tradition as a matter of public policy, our sense of fair play, and American criminal jurisprudence under the Sixth Amendment to the U.S. Constitution support the notion that there is a right for a person to be represented, but also the person has a right to defend himself.

The closure order is fundamentally and inherited unfair since Aylward's lawyer could not discuss the docu-

ments with his client. Because Aylward's lawyer was enjoined from discussing the documents with his client, the order posed a significant threat to the free flow of communication between them. A lawyer must be able to discuss any and all evidence with his client to provide effective assistance of counsel. The circumstances of this case could not present itself to a litigant acting pro se. Consequently, the closure order inhibited the ability of Aylward's lawyer to prepare his client's case and he served as an obstructer rather than a facilitator to his client's interests. Furthermore, the order was not necessary to further any interest in protecting the children, such as from trauma, public embarrassment, threat, or reprisals. The order simply impinged upon the truth-seeking process of the court, which raises an important question of accessibility of litigants to the courts.

CONCLUSION

A nonmovant litigant must have personal access to the evidence used against him on a motion for summary judgment as a matter of due process to have a fair opportunity to prepare and rebut the movant's motion. A litigant must be able to discuss all the evidence made available to his lawyer to provide effective assistance of counsel. The closure order of the court exceeded what was reasonably necessary to protect Aylward's children, and denied Aylward due process under the procedures of summary judgment. The Court of Appeals has sanctioned a departure by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The Court should grant certiorari to review this important question concerning the accessibility of a litigant to the court; reverse and set aside the order of the Seventh Circuit and the district court's closure order and order of partial summary judgment; and remand the case for further proceedings consistent with the opinion of this Court.

Respectfully submitted,

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UNPUBLISHED ORDER
NOT TO BE CITED PER CIRCUIT RULE 53

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 98-2119

ROBERT W. AYLWARD, - - - *Plaintiff-Appellant,*

v.

CLAIRE W. BAMBERG, - - - *Defendant-Appellee.*

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division
Larry J. McKinney, Judge

ORDER—Argued December 7, 1998
Decided July 6, 1999

BEFORE: HON. JOHN L. COFFEY, Circuit Judge, HON. JOEL M. FLAUM, Circuit Judge, HON. TERENCE T. EVANS, Circuit Judge.

On August 14, 1992, Claire Bamberg ("Bamberg") reported to military authorities at Fort Benning, Georgia she suspected Robert Aylward's ("Aylward") children were being sexually abused. Almost two years later, Aylward, an Army Sergeant at Fort Benning, filed a complaint in federal court against Bamberg claiming the telephone call amounted to defamation.[1] On October 24, 1995, Bamberg filed a motion to seal Certain documents she wanted to

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[1] On September 29, 1994, Bamberg filed a counterclaim for abuse of process. As of the date of this appeal, that claim was still pending in the district court.

submit in support of her motion for partial Summary judgment. The next day, the district court granted the motion, and on October 30, 1995, Aylward filed an objection to the motion to seal. The two parties then filed a barrage of motions attempting to strike numerous portions of the others' motions. The district court denied each of these and, on June 28, 1996, granted Bamberg summary judgment on the defamation claim.

Aylward now appeals, arguing that: I) if Bamberg had a duty to report the alleged abuse, she should have reported it to the authorities in Indiana, not Fort Benning; 2) the district court abused its discretion by sealing certain documents from Aylward; and 3) the district court committed error in granting Bamberg summary judgment because there existed genuine issues of material fact. We affirm.

Bamberg is a pastoral counselor employed at the Mount Gilead Counseling Center in Indianapolis, Indiana.[2] In September 1991, Aylward's former spouse, Julie Wisley ("Wisley"), sought counseling from Bamberg.[3] As a result of these sessions, Bamberg became convinced that Wisley had been subjected to various forms of abuse during the course of her marriage to Aylward.

In February 1992, Bamberg also began to provide counseling for Aylward's and Wisley's children: Rachel, who was age 9 at the time; Benjamin, who was also 9; Faythe, who was 7; and Sara, who was 2. After five months of counseling, Bamberg prepared a Case Summary detailing her findings regarding the children.

With regard to Rachel, the report noted that a medical exam at the Wishard Hospital[4] revealed an irregular shape

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[2] Bamberg holds herself out to be a psychotherapist, even though she is not certified with any state in that capacity.

[3] At all times relevant to this appeal, Aylward and Wisley were in the middle of a "bitter" divorce.

[4] The record is silent as to when the exams at Wishard were conducted.

to the hymen and apparent scar tissue both vaginally and rectally. When Bamberg combined this information with her own observations, she concluded that it was "highly probable" that Rachel had been a victim of sexual abuse.

With regard to Benjamin, the Wishard report also noted rectal scarring. There were also other indicators of abuse, including Benjamin being unusually thin, angry, abusive in a way different from sibling rivalry, and vocal about not wanting to spend time with his father. Bamberg concluded that it was also likely that Benjamin was being abused.

Faythe was slender, withdrawn, "clingy," and agitated. Additionally, she presented the most prevalent clinical symptoms of abuse of any of the four children. The examining physician at Wishard, although stating that the findings should not be used in isolation, concluded that sexual abuse was probable. The Wishard report noted oozing, thickened, attenuated hymenal tissue; labial separation; and an anal tear and fissure. Understandably, Bamberg was concerned for Faythe's well-being.

With regard to Sara, Bamberg initially believed her to be a well adjusted two-year-old. Bamberg's impression changed, however, after Sara's first week-long visit with her father. Bamberg's report noted that Wisley had informed her that Sara would scratch and dig at herself following a visit to her father's residence. While Bamberg recognized that there were innocent explanations for Sara's behavior, she believed, given her assessment of the overall family situation, that the more likely explanation was abuse.

Over the next 10 weeks, Bamberg noted a steady degeneration in the children's behavior. After speaking with Marilyn Hartman ("Hartman"), who represented Wisley in her divorce and custody proceedings, about her concerns regarding possible abuse, Bamberg was informed (by Hartman) that she had a legal obligation to report her suspicions to the proper authorities at Fort Benning. She did so, telephoning Sergeant Frederick Robinson of the United States Army.

After confirming that Sergeant Robinson was the proper person to report abuse to, Bamberg informed him that she was aware of a situation involving four children whom she believed were the victims of abuse.[5] She then identified Aylward and Wisley as the parents of the four children. At no time did she state that it was Aylward who was abusing the children.

In Aylward's federal suit, he claimed that the telephone call Bamberg made to the military police constituted defamation. Barnberg replied that Indiana law required her to make the report and provided her with a cloak of immunity. Given the obviously sensitive nature of the proceedings and concerned about her potential liability for illegally revealing information obtained during the course of her counseling sessions with Wisley and the children, Bamberg filed for permission to submit her motion for summary judgment and brief in support under seal. The district court granted the motion to seal the documents but allowed Aylward's counsel to view them.[6] Aylward objected, claiming that it was "unfair" and that the seal prevented him from meaningfully participating in the prosecution and defense of his case.

The district court disagreed with Aylward and denied his objection to the sealed documents. After carefully reviewing the materials set forth in Bamberg's motion for summary judgement and Aylward's response, the court granted summary judgment to Bamberg on the defamation claim. Aylward appeals.

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[5] There is some dispute as to whether Bamberg identified herself as a member of the organization known as the Alliance for the Rights of Children. Robinson's notes of the telephone call indicate that Bamberg did so— a point which Bamberg denies. The resolution of this factual dispute is not, however, necessary to resolve this appeal.

[6] Aylward was prevented from viewing the documents and Aylward's counsel was prevented from discussing them with his client.

On appeal, Aylward argues that: 1) if Bamberg had a duty to report the alleged abuse, she was required to report it to the authorities in Indiana, not Fort Benning; 2) the district court abused its discretion by sealing certain evidence from Aylward; and 3) the district court erroneously granted Bamberg summary judgment because there existed genuine issues of material fact.

In order to protect children, Indiana, like other states, has adopted measures seeking to uncover instances of child abuse.[7] The compelling interest of the state reflects characteristics special to abused children: they are often unaware of their own abuse or injury; they may be unable to report abuse because of their age or fear of retaliation; frequently the effects of abuse may be difficult for third parties to detect; abused children can and often do carry physical and emotional scars for a lifetime; and of course the state bears a special responsibility to protect children who have limited abilities to choose their own course of action. See *generally* Mary M. Huryley, *Duties in Conflict: Must Psychotherapists Report Child Abuse Inflicted by Clients and Confided in Therapy?*. 22 San Diego L. Rev. 645

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[7] Some examples from other states include: Ariz. Rev. Stat. § 13-3620 (1998); Ark. Code Ann. § 12-12-504 (Michie 1998); Cal. Penal Code §§ 11166, 11172 (West 1998); Conn. Gen. Stat. Ann § 17a-101 (West 1998); Fla. Stat. Ann. §§ 415.502 to 415.514 (West 1998); Ga. Code Ann. § 19-7-5 (1998); Idaho Code § 16-1619(1998); 325 Ill. Comp. Stat. Ann. 5/4 (West 1998); Iowa Code Ann. §§ 232.68 to 232.77 (West 1998); Ky. Rev. Stat. Ann. §§ 620.030, 620.040, 620.050 (Banks-Baldwin 1998); La. Rev. Stat. Ann § 14:403 (West 1998); Mass. Gen. Laws Ann. ch. 119, § 51A (West 1998); Mich. Comp. Laws Ann. § 722.633 *et seq.* (West 1998); Minn. Stat. Ann. § 626.556 (West 1998); Mo. Ann. Stat. § 210.115 (West 1998); N.J. Stat. Ann. § 9:6-8.8 et seq. (West 1998); Okl. Stat. Ann. tit. 10, § 7103 (West 1998); Tenn. Code Ann. § 37-1-401 *et seq.* (1998); Wash Rev. Code Ann. § 26.44.030 (West 1998); W. Va. Code § 49-6A-1 et seq. (1998); Wis. Stat. Ann § 48 981 (West 1998).

(1985); Frederica K. Lombard, *et al., Identifying the Abused Child: A Study of Reporting Practices of Teachers*, 63 U. Det. Mercy L. Rev. 657 (1 986); Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 Minn. L. Rev. 723 (1987).

In Indiana, "an individual who has reason to believe that a child is a victim of child abuse or neglect *shall* make a report." Ind. Code § 31-33-5-1 (1998) (emphasis added). This duty to report is absolute and applies to all persons. *See Devore* v. *State* 658 N.E.2d 657, 658 (Ind. Ct. App. 1995); *Daymude* v. *State* 540 N.E.2d 1263, 1265 (Ind. Ct. App. 1989). Accordingly, Bamberg, a resident of the state of Indiana, had an affirmative duty to report her suspicions to the proper authorities if she had a "reason to believe" that the children were being abused.

Reason to believe is defined as "evidence that, if presented to individuals of similar background and training, would cause the individuals to believe that a child was abused or neglected." Ind. Code § 31-9-2-101(1998). Moreover, Indiana law provides immunity to individuals who report child abuse or neglect. According to the Indiana Code:

> Except as provided in section 2 [IC § 31-33-6-2) of this chapter, a person, other than a person accused of child abuse or neglect, who:
>
> (1) *makes or causes to be made a report of a child who may be a victim of child abuse or neglect;*
>
> (2) is a health care provider and detains a child for purposes of causing photographs, x-rays, or a physical medical examination to be made under IC 31-33-10;
>
> (3) makes any other report of a child who may be a victim of child abuse and neglect; or
>
> (4) participates in any judicial proceeding or other proceeding:
>
> (A) resulting from a report that a child may be a victim of child abuse or neglect; or
>
> (B) relating to the subject matter of the report;

> is immune from any civil or criminal liability that might otherwise be imposed because of such actions.

Id. at § 31-33-6-1 (emphasis added). The exception in the statute provides that "[i)mmunity does not attach for a person who has acted maliciously or in bad faith." *Id.* at § 31-33-6-2. However, "[a] person making a report that a child may be a victim of child abuse or neglect or assisting in any requirement of this article is *presumed* to have acted in *good faith." Id.* at § 3 1-33-6-3 (emphasis added). Thus, according to these statutes, Bamberg was required to report her suspicions to the proper authorities if she had "reason to believe" the children were suffering from abuse, and she is immune from civil liability for her action unless she acted "maliciously or in bad faith."

Aylward's first contention on appeal is that Bamberg acted in bad faith because she reported the suspected abuse to the authorities at Fort Benning instead of the authorities in Monroe County, Indiana. It is, of course, "axiomatic that an issue not first presented to the district court may not be raised before the appellate court as a ground for reversal." *Huntzinger* v. *Hastings Mut. Ins. Co.*, 143 F.3d 302, 307 (7th Cir. 1998) (internal quotes omitted). Because Aylward failed to present this claim to the district court, it is waived. *See id.*

In the district court, Bamberg argued that the sensitive nature of the proceedings as well as her desire to ensure that she protected herself from liability for improperly divulging information obtained during the course of her counseling Wisley justified sealing her motion for summary judgment.[8] Aylward responded, as he does in this

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[8] Although we understand the sensitive nature of these proceedings, Bamberg's concern with liability may have been misplaced. Her lack of any official certification as a psychotherapist makes this court suspicious of any claim to the psychotherapist-patient relationship as enumerated in *Jaffee* v. *Redmond*, 518 U.S. 1, 9-11 (1996). And although Bamberg is a member of the clergy, the record does not support the conclusion that Wisley approached her with the necessary penitence for the clergy-penitent privilege to apply. *See United States* v. *Dube*, 820 F.2d 886, 889 (7th Cir. 1987). The resolution of this issue, however, is not necessary for the disposition of this appeal.

court, that even though his counsel was permitted to view the documents, his prohibition from seeing them or discussing them with counsel was "unfair" and prevented him from meaningfully contributing to the prosecution and defense of his case.[9] The district court's decision to seal Bamberg's motion for summary judgment and accompanying brief in support is reviewed for an abuse of discretion. *See Cusack* v. *Bank United of Texas FSB* 159 F.3d 1040, 1042 (7th Cir. 1998).

A decision to seal the record will occasionally be necessary to promote the interests of justice. *See Grove Fresh Distrib., Inc.* v. *Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (seal only appropriate where necessary to preserve higher values); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1314 (7th Cir. 1984) (seal appropriate only in an exceptional circumstance). Within this vein, courts have long recognized the need to protect the physical and psychological well-being of child abuse victims in judicial proceedings, and a variety of measures have been used to ameliorate the harsh consequences associated with child abuse cases. *See e.g. Maryland* v. *Craig*, 497 U.S. 836, 843 (1990) (child testified over one-way closed circuit television outside the presence of the parties); *United States* v. *Carrier*, 9 F.3d 867, 869 (10th Cir. 1993) (child testified over two-way closed circuit television in the presence of the attorneys); *United States* v. *Garcia*, 7 F.3d 885, 887 (9th Cir. 1993) (child testified over two-way closed circuit television outside the presence of the defendant); *Thomas* v. *Gunter*, 962 F.2d 1477, 1480 (10th Cir. 1992) (child videotaped at treatment center in the presence of her therapist and an investigator selected by the defendant); *Spigarolo*

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[9] We reiterate that Aylward's counsel was provided full access to the documents and, in fact, filed a detailed response to the summary judgment motion.

v. *Meachum*. 934 F.2d 19, 21 (2d Cir. 1991) (child videotaped in the presence of the attorneys and judge); *Arcaris* v. *Superior Court*, 774 P.2d 837, 839 (Ariz. Ct. App. 1989) (mother allowed to be present during child's deposition); *Otteson* v. *District Court*, 443 N.W.2d 726, 727 (Iowa Ct. App. 1989) (defendant separated from child by one-way mirror). We are of the opinion that these cases strike an appropriate balance between the need to provide a supportive environment for the child witness and the defendant's right to a fair trial. In light of the extraordinary measures courts are willing to go to protect a child's interest in criminal cases, where the stakes are much higher, we refuse to hold that the district court abused his discretion by sealing Bamberg's motion for summary judgment in a civil case.

Aylward challenges the grant of summary judgment to Bamberg on his defamation claim. He argues that the existence of certain disputed, material facts as to whether Bamberg acted maliciously or in bad faith precluded the grant of summary judgement. "We review the trial court's grant of summary judgment *de novo*, reviewing the record in the light most favorable to the non-moving party. *Aberman* v. *Abouchar & Sons. Inc.*, 160 F.3d 1148, 1150 (7th Cir. 1998) (citing *Thomas* v. *Ramos*, 130 F.3d 754, 759 (7th Cir. 1997)) (emphasis in original). The grant of "[s]ummary judgment is appropriate only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Huntzinger*, 143 F.3d at 306-07 (quoting Fed. R. Civ. P.56(c)). After reviewing the record, we are of the opinion that Aylward failed to meet his burden of rebutting Indiana's presumption of good faith when Bamberg reported her suspicions that the children may be the victims of abuse to the authorities at Fort Benning. In fact, from our review of the record, we are convinced that Bamberg had

good reason to believe that the children had recently been subjected to abuse. [10]

For example, therapy sessions with Wisley led Bamberg to opine that Wisley was subjected to mental, emotional, physical, as well as sexual abuse during her marriage. While this information does not relate directly to the condition of the children, it does suggest an atmosphere conducive to abuse.

More importantly, Bamberg began counseling the four children in early 1992. In a report dated June 2, 1992, Bamberg documented her findings regarding the children, relying on her own observations and medical reports prepared at the Wishard Hospital. As previously stated, these reports noted that each of the three oldest children exhibited genital and/or rectal abnormalities.[11]

A variety of clinical indicators also suggested a high probability of abuse. Though other possible explanations for some of these indicators existed, answers obtained from Wisely convinced Bamberg that explanations other than abuse were unlikely. Additionally, Bamberg assessed the children's behavior and attitudes through the Sex Abuse Legitimacy Schedule, a test applied to differentiate between legitimate and illegitimate claims of abuse. According to Bamberg, the test results for all four children strongly suggested abuse.

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[10] We are aware that the record contains information which supports the proposition that the children were not actually abused. Most of this information, however, was unavailable to Bamberg and Indiana requires that Bamberg inform the authorities as soon as she has "reason to believe," not when she is absolutely certain, child abuse is occurring.

[11] Regarding Rachel and Faythe, the reports indicated that the physical findings would support allegations of sexual abuse but, in isolation, did not prove such abuse occurred. Regarding Benjamin, the reports indicated that the physical findings would neither support nor negate concerns of sexual abuse.

There was also other information which supported Bamberg's conclusion that the children were being abused. For example, Wisley gave Bamberg verbal updates about the children, a well as notes and journal entries chronicling the children's behavior. Wisley also produced audio tapes of the children's conversations with her and with each other. Bamberg reviewed all these materials before reporting the suspected abuse. Additionally, Bamberg reviewed a Monroe County (Indiana) Circuit Court Juvenile Division caseworker's reports, dated September 26, 1990, and a letter from the Charter Counseling Center, dated January 21, 1991, which contained further evidence strongly suggesting abuse.

On July 1, 1992, Bamberg prepared another report concerning the children's condition, stating that they appeared to be suffering from "increased difficulties." The report noted particular degeneration of Faythe, Rachel, and Sara, as well as an increase in Benjamin's anger; all of which Bamberg found to be clinically significant.

In mid-August, Bamberg spoke with Hartman, Wisley's divorce attorney, and indicated to Hartman that she had observed a recent deterioration in the children's behavior. Hartman, in turn, informed Bamberg that if she believed any abuse was present she (Bamberg) had a legal duty to report the information to the proper authorities. It was only after this that Bamberg called the military police at Fort Benning and reported her suspicions to Sergeant Robinson. Based upon all this information, Bamberg had more than a sufficient reason to believe the four children were victims of child abuse.

As stated previously, Indiana law provides civil immunity for an individual who reports her suspicions of child abuse or neglect unless the person "acted maliciously or in bad faith." Ind. Code § 31-33-6-2. Moreover, the statute specifically provides that good faith is to be presumed. *See id.* at § 31-33-6-3; *see also Kinder* v. *Doe*, 540 N.E.2d 111, 115 (Ind. Ct. App. 1989) ("In balancing the policies [of encouraging reports of suspected abuse versus discourag-

ing reports made maliciously or in bad faith] the (Indiana] legislature has tipped the balance in favor of encouraging reports by providing that reporters will be presumed to have acted in good faith."). Therefore, we, like the district court did, begin with the presumption that Bamberg acted in good faith when she reported her suspicions of child abuse to the military police at Fort Benning.

The only portion of the record which could be used to support Aylward's assertion that Bamberg acted in bad faith comes in the form of his own affidavit, which states:

> 18. He [Aylward) believes that the report of sexual abuse by [Bamberg] to the military authorities at Ft. Benning . . . was done with actual malice, ill-will, and in bad faith because it was done in concert with others around this time, such as the Alliance for the Rights of Children, Kitty Kruse, Leorna Rosen, Mitchelle Etlin, and others to damage his reputation with the military and to circumvent the decision of the Monroe Circuit Court with the intent to take custody of his children from him, she had no personal knowledge of the allegations she made against him, the children made no such allegations to her during her last telephone therapy session, and that she was acted [sic] as agent on behalf of her client, [Wisley], whose malice, ill-will, and bad faith were acted out through [Bamberg], whose recommendations had been rejected by the Monroe Circuit Court.

Unfortunately for Aylward, the facts described in his affidavit fail to make the necessary showing that Bamberg acted from any improper motive. Aylward never attaches any legal significance to his claims that Bamberg acted in concert with others nor did he substantiate his allegation that these individuals acted to circumvent the Monroe Circuit Court's decision regarding custody or to damage his reputation. The challenge regarding Bamberg's lack of personal knowledge also fails to imply any impropriety. Indiana law does not require personal knowledge and his affidavit does not dispute the numerous other sources Bamberg considered before reaching her conclusions. Similarly,

Aylward's claim that Bamberg acted as Wisley's agent is mere speculation.

Paragraph 18 contains nothing more than conclusory language and such language does not preclude summary judgement. *See Jackson* v. *E.J. Branch Corp.*, No. 97-3940, 1999 WL 274546, at *11 (7th Cir. May 5, 1999) ("These assertions without factual support are simply not enough to overcome [Aylward's] burden. Even though it is true, because this case comes before us on a summary judgment motion, that we will construe the facts and draw inferences in the manner most favorable to the nonmoving party, it is equally axiomatic that a plaintiffs conclusory statements do not create an issue of fact.").

Indiana law mandated that Bamberg report her suspicions to the proper authorities. It also directs that we presume she acted in good faith in making the report. Because Aylward never adequately rebutted this presumption, the decision of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 94-0705 M/S

ROBERT W. AYLWARD, - - - - - - *Plaintiff,*

v.

CLAIRE W. BAMBERG, - - - - - - *Defendant.*

ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In the present dispute, Plaintiff Robert W. Aylward ("Aylward") has raised a defamation claim against Defendant, Claire W. Bamberg ("Bamberg"). Essentially, Aylward has alleged that Bamberg committed slander under Indiana law when she reported to the military police in Fort Benning, Georgia, that Aylward's children may have been abused. Bamberg has responded that Indiana law not only required her to make this report but also shields her with immunity for having done so. Consequently, Bamberg has filed a Motion for Partial summary Judgment on Aylward's defamation claim. for reasons sets forth fully below, this Court now GRANTS this Motion for Summary Judgment.

The standards for summary judgment have been frequently recited by this Court and are no doubt familiar to the parties. According to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When this standard has been met, summary judgment is mandatory. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986); *Shields Enters.*,

Inc. v. *First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Rather, the disputed facts must be outcome determinative. *Anderson* v. *Liberty Lobby. Inc.*, 477 U.S. 242, 248 (1986); *Schroeder* v. *Barth*, 969 F.2d 421, 423 (7th Cir. 1992). Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *Anderson*, 477 U.S. at 248. Moreover, " 'self-serving affidavits without factual support in the record will not defeat a motion for summary judgment.' " *Darnell* v. *Target Stores*, 16 F.3d 174, 177 (7th Cir. 1994) (*quoting Slowiak* v. *Land O'Lakes. Inc.*, 987 F.2d 1293, 1295 (7th Cir. 1993)).

In the present case, the parties do not dispute certain principal facts. Bamberg is a pastoral counselor and psychotherapist employed at Mount Gilead Counseling Center. Claire Bamberg Aff. ("Bamberg Aff."), ¶ 2. In September, 1991, Bamberg first met Julie Wisley ("Wisley"), who was Aylward's former spouse, and Bamberg and Wisley entered into a counseling relationship. Bamberg Aff., ¶ 3. Beginning in February, 1992, Bamberg also provided counseling for the four children of Aylward and Wisley: Rachel, Benjamin, Faythe, and Sara. Barnberg Aff., ¶ 10, Att. A. This gave Bamberg the opportunity to talk with and to observe the children. Based upon her observations, discussions with the children and their mother, and certain clinical reports, Bamberg concluded that it was highly probable the children had been abused by someone. Bamberg Aff., ¶¶ 11-15, 16-17. Accordingly, on August 15, 1992, Bamberg telephoned the military police at Fort Benning, Georgia—where Aylward was stationed at the time—to report her suspicion of child abuse. Bamberg Aff., ¶¶ 19-21.

Aylward now contends that this telephone call to the military police constituted defamation; Bamberg counters that Indiana law required her to make the report and provides her with a cloak of immunity. Section 31-6-11-3 of the Indiana Code unambiguously states that "any individual who has reason to believe that a child is a victim of

child abuse or neglect *shall* make a report as required by this chapter." (emphasis added). *See also Devorev. State*, 658 N.E.2d 657, 658 (Ind. Ct. App. 1995) (emphasizing that everyone has a duty to report suspected child abuse); *Daymude* v. *State*, 540 N.E.2d 1263, 1265 (Ind. Ct. App. 1989) (noting that duty to report applies even when information received through the course of confidential communications). This chapter defines "reason to believe" to mean "evidence that, if presented to individuals of similar background and training, would cause those individuals to believe that a child was abused or neglected." Ind. Code § 31-6-11-2.1. Moreover, under certain circumstances, Indiana law does provide immunity to individuals who report child abuse or neglect. According to § 31-6-11-7,

> [a] person, other than a person accused of child abuse or neglect, who . . . makes or causes to be made a report of a child who may be a victim of child abuse or neglect . . . is immune from any civil or criminal liability that might otherwise be imposed because of such actions. However, immunity does not attach for any person who has acted maliciously or in bad faith. A person making a report that a child may be a victim of child abuse or neglect or assisting in any requirement of this chapter is presumed to have acted in good faith.

According to these statutes, Indiana law required Bamberg to make a report if she had "reason to believe" the children were suffering from abuse. Moreover, she is immune from civil liability for her action unless she acted "maliciously or in bad faith."

The evidence presently before this Court indicates that Bamberg had reason to believe the children may be suffering from abuse. For example, through therapy sessions with Wisley, Bamberg learned of several abusive incidents during Wisley's relationship with Aylward. Bamberg Aff., ¶¶ 6-9. Based upon descriptions of these incidents, Bamberg believes Wisley was subjected to mental, emotional, physical, and sexual abuse during her marriage to Aylward. Bamberg Aff., ¶ 9. While this information does not relate

directly to the condition of the children, it does suggest an atmosphere conducive to abuse.

More importantly, Bamberg began counseling sessions with the four Aylward children in early 1992. Bamberg Aff., ¶ 10, Att. A. In a report dated June 2, 1992, Bamberg documented her findings regarding the four children. Bamberg Aff., ¶ 10, Att. A. In reaching her conclusions, Bamberg relied upon her own observations as well as medical reports prepared at Wishard Hospital. Bamberg Aff., ¶ 10, Att. A. While the specific details of these medical reports shall not be repeated here, it is highly significant that the reports state that each of the children exhibited genital and/or rectal abnormalities. Bamberg Aff., ¶¶ 11-14, Atts. A, D. Regarding Rachel and Faythe, the Wishard reports indicate that the physical findings would support allegations of sexual abuse but, in isolation, did not prove such abuse occurred. Bamberg Aff., Att. D. Regarding Benjamin and Sara, the reports indicate that the physical findings would neither support nor negate concerns of sexual abuse. Bamberg Aff., Att. D.

Bamberg also noted that various clinical indicators indicated a high probability of abuse. Bamberg Aff., ¶¶ 11-14, Att. A. Although Bamberg also explored other possible explanations for some of these abnormalities, answers obtained from Wisley made explanations other than abuse unlikely. Bamberg Aff., ¶ 11. In addition, Bamberg assessed the children's behavior and attitudes through the Sex Abuse Legitimacy Schedule, a test applied to differentiate between legitimate and illegitimate claims of abuse. Bamberg Aff., ¶ 15, Atts. A, B. According to Bamberg's report, the test results for all four children strongly suggested sexual abuse. Bamberg Aff., ¶ 15, Atts. A, B.

Other information known by Bamberg at that time also supported her conclusion that the children may have been abused. Bamberg Aff., Att. D. For example, Wisley gave Bamberg verbal updates about the children—as well as notes and journal entries chronicling the children's behavior and audio tapes of children's conversations with her

and with each other. Bamberg Aff., ¶ 23. Bamberg also reviewed a caseworker's report dated September 26, 1990, which contained further evidence strongly suggesting abuse. Bamberg Aff., Att. D.

In late July of 1992, Bamberg prepared another report to the court concerning the children's condition. Bamberg Aff., ¶ 16, Att. C. This report, dated July 31, 1992, noted that the children appeared to suffer from increasing difficulties. Bamberg Aff., Att. C. In July and August, Bamberg noted particular degeneration of Faythe, Rachel, and Sara—as well as an increase in Benjamin's anger. Bamberg Aff., ¶ 17. Bamberg found these changes clinically significant. Bamberg Aff., ¶ 17.

On August 14, Bamberg spoke on the telephone with Marilyn Hartman, who represented Wisley in the ongoing divorce and custody proceedings between Wisley and Aylward. Bamberg Aff., ¶ 18. When Bamberg indicated to Hartman that she had observed a recent degeneration in the children's behavior, Hartman responded that Bamberg had a legal obligation to report that information to the proper authorities at Fort Benning in Georgia. Bamberg Aff., ¶ 18. The following day, Bamberg telephoned the military police at Fort Benning—whom she believed to be the proper agency to receive this report of suspicion of child abuse—and spoke to Sergeant Frederick Robinson ("Sergeant Robinson") of the United States Army. Bamberg Aff., ¶¶ 19-20. After Sergeant Robinson indicated he was the proper person to take a report of suspicion of abuse, Bamberg informed him that she had become aware of facts that led her to suspect that Aylward and Wisley's children may be suffering from abuse and that she believed the children should be examined. Bamberg Aff., ¶¶ 20, 21. Sergeant Robinson stated that he would take care of this examination. Bamberg Aff., ¶ 21.

When taken together, this evidence seems to present a strong likelihood that the Benjamin, Rachel, Faythe, and Sara may have been subjected to abuse or neglect. In fact, Bamberg had more than her own observations to support

her suspicion. She reviewed medical reports indicating certain physical abnormalities. She noted that various clinical indicators and tests suggested abuse. In addition, she believed that various forms of abuse may have been present during Wisley's marriage to Aylward. Based upon all this information, it appears plain that Bamberg had reason to believe the four children were victims of child abuse. Consequently, Indiana law placed an affirmative duty upon Bamberg to report her suspicions to the proper legal authorities.

As stated previously, Indiana law provides civil immunity for an individual who reports her suspicion of child abuse or neglect unless the person "acted maliciously or in bad faith." Ind. Code § 31-6-11-7. Moreover, the statute specifically provides that "[a] person making a report that a child may be a victim of child abuse or neglect or assisting in any requirement of this chapter is presumed to have acted in good faith." *Id.; see also Burrell* v. *Meads*, 540 N.E.2d 111, 115 (Ind. Ct. App. 1989) ("In balancing the policies [of encouraging reports of suspected abuse versus discouraging reports made maliciously or in bad faith] the legislature has tipped the balance in favor of encouraging reports by providing that reporters will be presumed to have acted in good faith."). Therefore, this Court must presume that Bamberg acted in good faith when she reported her suspicions to the military police.

Stated simply, Aylward has not presented evidence sufficient to rebut this presumption. The only evidence even remotely pertinent to this issue comes in Aylward's own affidavit, which provides as follows:

> 18. He [Aylward] believes that the report of sexual abuse by Claire W. Bamberg to the military authorities at Ft. Benning, Georgia on August 15, 1992, was done with actual malice, ill-will, and in bad faith because it was done in concert with others around this time, such as the Alliance for the Rights of Children, Kitty Kruse, Leorna Rosen, Mitchelle Etlin, and others to damage his reputation with the military and to circumvent the decision of the Monroe Circuit Court

> with the intent to take custody of his children from him, she had no personal knowledge of the allegations she made against him, the children made no such allegations to her during her last telephone therapy session, and that she was acted as agent on behalf of her client, Julie Wisley, whose malice, ill-will, and bad faith were acted out through Claire W. Bamberg, whose recommendations had been rejected by the Monroe Circuit Court.

Robert Aylward Aff., ¶ 18. The facts described by Aylward fail to suggest that Bamberg acted from any improper motive. Aylward has not ascribed any legal significance to his assertion that Bamberg acted in concert with others nor has he substantiated his allegation that these individuals acted to circumvent the Monroe Circuit Court's decision regarding custody or to damage his reputation. The challenge to Bamberg's personal knowledge does not imply any impropriety-especially given the broad range of sources Bamberg considered in reaching her conclusions. The suggestion that Bamberg acted to implement Wisley's private agenda appears to be nothing more than speculation without any factual support. This paragraph contains nothing more than conclusory allegations of malice, ill-will, and bad faith; such conclusory language in an affidavit does not preclude summary judgment.

Indiana law directs that this Court must presume Bamberg acted in good faith when she reported her suspicions to the military police in Georgia. Nothing in the present record has rebutted this presumption. Accordingly, Bamberg is entitled to statutory immunity for her action, and summary judgment on Aylward's defamation claim must be GRANTED in her favor.

IT IS SO ORDERED this 28th day of June, 1996.

/s/ Larry J. McKinney
Larry J. McKinney, Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP94-705-C-M/F

ROBERT W. AYLWARD, - - - - - - *Plaintiff,*

v.

CLAIRE W. BAMBERG, - - - - - - *Defendant.*

ORDER

Comes now the Court upon the Motion of Defendant and Counter-Plaintiff, Claire W. Bamberg, to seal her Submission of Evidentiary Materials in Support of Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment.

The Court, being duly advised, hereby finds that said motion is well taken and should be GRANTED. The Court thereby specifically orders that the tendered evidentiary materials in support of Defendant Bamberg's Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment shall be ordered sealed and directs the Clerk of this Court to seal such documents and prohibit their dissemination to any third parties. The Court further orders that while Mr. Manns is hereby authorized to open the sealed copy of the evidentiary materials in support of Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment that have been previously tendered to him, he shall not share same with any other person and shall specifically not share same with his client, Plaintiff, Robert W. Aylward. Mr. Manns is ordered to strictly limit his use of these materials to the presentation and/or defense of the claims raised in this case. Should either party to this case conclude that such publication into the unsealed record in this case or

third-party dissemination is necessary to preserve their rights in this lawsuit or to litigate their position, either at trial or at some point prior to trial, this Court shall consider such modification of this Order only upon written motion or consent of both parties.

IT IS SO ORDERED.

Dated: October 25, 1995

/s/ Larry J. McKinney, Judge
United States District Court
Southern District of Indiana

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Supreme Court, U. S.
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(2)

No. 99-1005

In The

Supreme Court of the United States

ROBERT W. AYLWARD,

Petitioner,

versus

CLAIRE W. BAMBERG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court acted within its discretion by ordering that certain documents filed in conjunction with Defendant-Appellee Bamberg's Motion for Partial Summary Judgment be sealed and not presented to Plaintiff Aylward personally, but where the court allowed Aylward's counsel full and complete use of these documents as it related to this litigation and where Aylward has shown no prejudice.

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STATEMENT OF THE CASE

In February 1992, Appellee, Claire Bamberg ("Bamberg"), a pastoral counselor, began counseling the four children of her patient, Julie Wisley ("Wisley") and Wisley's former husband, Appellant, Robert Aylward ("Aylward"). On August 14, 1992, Bamberg reported to military authorities at Fort Benning, Georgia, she suspected Aylward's children were being sexually abused. She did not accuse Aylward or speculate as to the identity of a potential perpetrator. Almost two years later, Aylward, a soldier at Fort Benning, filed a complaint, based upon diversity, in federal court against Bamberg alleging that the telephone call amounted to defamation. In response, Bamberg replied that Indiana Code § 31-33-5-1 (1997), Indiana's child abuse reporting statute, required her to make the report and provided her with a cloak of immunity. Indiana law provides civil immunity for an individual who reports her suspicions of child abuse or neglect unless the person "acted maliciously or in bad faith" and that good faith is to be presumed. Indiana Code §§ 31-33-6-1 to 31-33-6-3 (1997). Extensive discovery ensued, including Aylward taking Bamberg's deposition. During the pendency of this action, Aylward and Wisley were undergoing a "bitter" divorce.

On October 24, 1995, due to the obviously sensitive nature of the proceedings and concern for her potential liability for illegally revealing information obtained during her counseling with Wisley and the children, Bamberg filed a motion to seal certain counseling-related information and documents she wanted to submit in support of her motion for partial summary judgment. The

district court granted the motion and sealed certain documents from the public. The court further prohibited Aylward from viewing the documents and Aylward's counsel from discussing them with Aylward. The court did not prohibit Aylward's counsel from full access to the sealed documents. Aylward filed his objection to the motion to seal, which the Court denied. Aylward's counsel was provided copies of the sealed documents, and Aylward, through his counsel, filed a detailed response to the summary judgment motion. Following extensive briefing and motions by both parties concerning the evidentiary value of various documents, the district court carefully reviewed the materials set forth in Bamberg's motion for summary judgment and Aylward's response and granted summary judgment to Bamberg on the defamation claim.

Aylward took an interlocutory appeal pursuant to Fed. R. Civ. P. 54(b). After careful review of the proceedings, the Court of Appeals of the Seventh Circuit correctly affirmed the district court's judgment

A. The petition misrepresents Aylward's cause of action.

The petition misrepresents Aylward's complaint against Bamberg as being "essentially" a claim for conspiracy between Bamberg, Wisley, Aylward's former wife, and others, to commit slander against him. Pet. p. 2. In fact, the complaint named only Bamberg and alleged only defamation.

B. The petition misrepresents Aylward's objection to the Court's sealing the records.

The petition misrepresents that Aylward's objection to the court's sealing the specified records from Aylward's personal inspection or knowledge was that Bamberg could not claim a psychotherapist-patient privilege, and thus, there were no legally sufficient grounds to serve as the basis for sealing the record. Pet. p. 3. In fact, Aylward objected on the ground that the sealing procedure was "unfair" and that the seal prevented him from meaningfully participating in the prosecution and defense of his case. Pet. App. p. 8a.

C. The petition misrepresents that the circuit court agreed that Bamberg failed to show a privilege justifying sealing the record.

The petition misrepresents that the Court of Appeals of the Seventh Circuit agreed that Bamberg failed to show that a privilege justified sealing the documents. Pet. p. 4. In fact, the Seventh Circuit refused to make a determination of whether Bamberg's counseling sessions were subject to psychotherapist-patient relationship and/or clergy-penitent privileges because the Court determined this was not necessary for the resolution of the appeal. Pet. App. p. 7a.

ARGUMENT

Reasons for Denying the Writ

The petition's fact-bound claim that the trial court below abused its discretion in determining the necessity of sealing certain documents from Aylward's personal review, but not his attorney's, simply does not warrant review by this Court. As the Court of Appeals for the Seventh Circuit found, the decision was plainly a correct application of settled law and was within the accepted practice and usual course of proceedings for district courts. Further, Aylward has not even alleged a conflict among the circuits. As detailed below, there is no cause for this Court's review of Aylward's contention, which has already been rejected by the District Court and by the Seventh Circuit Court of Appeals. –

The trial court's decision to seal Bamberg's motion for summary judgment is reviewed for an abuse of discretion. *Cusack v. Bank United of Texas FSB*, 159 F.3d 1040, 1042 (7th Cir. 1998). A district court is given discretion to seal records where necessary to promote the interests of justice. *Grove Fresh Distrib. Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). While in our judicial system adversary proceedings are the norm and ex parte proceedings are the exception, courts have generally recognized the capacity of a district judge to "fashion and guide the procedures to be followed in cases before him." *United States v. Thompson*, 827 F.2d 1254, 1257 (9th Cir. 1987). "[D]istrict judges are able to consider matters that may be unique to particular fact situations and tailor procedures to serve the ends of justice . . ." *Id.* at 1258. Moreover, as noted by this Court, courts have the power

to insure that their records are not "used to gratify private spite or promote public scandal," and have "refused to permit their files to serve as reservoirs of libelous statements for press consumption." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

Accordingly, given the sensitivity of the counseling and medical records concerning third parties and the potential abuse of the records both in the pending divorce proceeding and through recrimination toward the children, the impartial district court's procedure was manifestly acceptable and within its discretion in balancing the rights of Aylward, Bamberg, and the third parties – namely Wisley and the four children. *See e.g., Meridian Intern. Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir. 1991), in which the Ninth Circuit found that the trial court acted properly when it sealed FBI declarations from the public as well as from the plaintiff and his counsel and then reviewed the declarations in deciding the defendant's dispositive motion.

Further, the district court's actions are acceptable and within the usual course of proceedings given the well-recognized "need to protect the physical and psychological well-being of child abuse victims in judicial proceedings" necessitating "a variety of measures . . . to ameliorate the harsh consequences associated with child abuse cases." *Aylward v. Bamberg*, 187 F.3d 921 (7th Cir. 1999), citing *Maryland v. Craig*, 497 U.S. 836, 843 (1990), as well as several cases dealing with uniquely crafted procedures to protect children during criminal trials. Pet. App. pp. 8a-9a. Thus, it is the accepted and usual course in criminal judicial proceedings for courts to strike an

appropriate balance between the need to provide a supportive environment for the child witness and a defendant's right to a fair trial. In light of the extraordinary measures courts are willing to go to protect a child's interest in criminal cases, where the stakes are much higher, the Seventh Circuit correctly found no need to deviate from the accepted practice and usual course of protecting child abuse victims by balancing the interests of the children with the interests of the parties in a civil case for money damages.

Finally, Aylward has not stated any way whatsoever in which he was prejudiced because he was not personally able to review the sealed documents. As noted by the Seventh Circuit, Aylward was given opportunity to object to the motion to seal. Pet. App. pp. 7a-8a. The district court's order provided for the future review of the order "either at trial or at some point prior to trial" should either party find publication "necessary to preserve their rights in this lawsuit or to litigate their position." Pet. App. pp. 22a-23a. Aylward was not prevented from responding in full to the motion for summary judgment, and as the Seventh Circuit recognized, Aylward's counsel reviewed the sealed documents thoroughly and prepared a detailed response on behalf of Aylward to the motion for summary judgment. Pet. App. p. 8a.

Aylward was afforded ample opportunity through the discovery process to gather information, if any existed, to permit him to survive a motion for summary judgment. Indeed, Aylward deposed Bamberg as well as the Fort Benning soldier to whom Bamberg reported her suspicions. Despite extensive discovery, Aylward was unable to show a genuine issue of fact indicating an

improper motive on the part of Bamberg so as to dispel the cloak of immunity that the child abuse reporting statute granted Bamberg and deny Bamberg summary judgment. Finally, Aylward has been unable to point to any prejudice resulting from his personal inability to review the sealed documents, even after he had opportunity to view multiple briefs discussing the records in detail during the appellant procedure.

The Court of Appeals properly found the District Court's Order granting the Motion to Seal was manifestly reasonable. It protected the rights of all concerned, while also allowing full adjudication of the issue raised by the Motion for Partial Summary Judgment. Aylward was not prejudiced by this procedure in any way whatsoever. This ruling did not depart from the accepted and usual course of judicial proceedings and does not call for an exercise of this Court's supervisory powers.

CONCLUSION

Certiorari is not warranted. The Seventh Circuit correctly applied the applicable federal rules of trial procedure. For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: January 14, 2000

Respectfully submitted,

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